U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 99 237 50278 Office: VERMONT SERVICE CENTER Date: 07 JAN 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

Public Copy

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a New York corporation that claims to be engaged in the export of medical products. It seeks to employ the beneficiary as its vice president and export manager and, therefore, endeavors to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director denied the petition because evidence in the record did not support a finding that the petitioner currently employs and would continue to employ the beneficiary in a primarily managerial or executive capacity.

On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that the beneficiary's employment by the petitioner in L-1A nonimmigrant status should be sufficient to approve the immigrant petition.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The director denied the petition due to the petitioner's failure to submit evidence of the beneficiary's primary role as an executive or manager. According to the director, while it appeared that the beneficiary spends an unspecified amount of time engaged in the activities of an executive, it did not appear that the beneficiary would spend a primary amount of his time executing executive functions.

On appeal, counsel objects to the denial of this petition in light of the prior approval of an L-1A nonimmigrant petition and a subsequent extension of the same in the beneficiary's behalf. Counsel maintains that the beneficiary's current duties, which were sufficient for the granting of L-1A nonimmigrant status, are the exact same duties upon which this immigrant petition is based. Counsel states that "[i]t is inconceivable that based on the beneficiary's prior position in Russia and, more importantly, his current duties with the petitioner, one would conclude that he is not employed with the petitioner in a managerial or executive capacity."

Evidence in this case is not persuasive to overturn the director's decision to deny the petition. As shall be discussed, the petitioner fails to adequately demonstrate that the beneficiary devotes the primary amount of his time to executing managerial or executive functions.

In order to be found eligible for this immigrant visa classification as an executive, the record must clearly show that the beneficiary *primarily*:

(A) Directs the management of the organization or a major component or function of the organization;

(B) Establishes the goals and policies of the organization, component, or function;

(C) Exercises wide latitude in discretionary decision-making; and

(D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Additionally, if the petitioner would like to classify the beneficiary as a multinational manager, the petitioner would need to establish that the beneficiary *primarily*:

(A) Manages the organization, or a department, subdivision, function, or component of the organization;

(B) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(C) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel

actions (such as promotion and leave authorization), or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

See. 8 C.F.R. 204.5(j)(2).

The petitioner fails to establish that the beneficiary works in a primarily executive role because it fails to establish that the beneficiary directs the management of the organization or a major component or function of the organization. The petitioner also fails to establish that the beneficiary works in a primarily managerial role because the evidence does not indicate that the beneficiary manages the organization, or a department, subdivision, function, or component of the organization.

The Service reaches these conclusions based upon the petitioner's description of its organizational structure:

> The nature of the Petitioner's business does not require for it to maintain a large staff. It is a highly personalized, hands-on business. **It requires personnel in the United States to essentially contact manufacturers and suppliers in order to fill requirement orders for its customers abroad.** These goods are essentially shipped directly from the U.S. manufacturers and suppliers to the Petitioner's distribution centers abroad. As a result, the Petitioner does not require in the U.S. warehousing of the purchased product or a substantial support staff. (Emphasis added.)

The record indicates that the petitioner employs a president, a vice president and export manager (beneficiary), a purchasing manager, and an assistant/secretary. Therefore, if all of the petitioner's staffpersons are contacting manufacturers and suppliers in order to fill orders, then the petitioner's employees are functioning as sales and marketing persons; they only hold titles that appear managerial or executive in nature, but they are not working primarily as managers or executives.

If the beneficiary is contacting suppliers and manufactures, he is neither directing the management of the organization, or managing a component or essential function of the organization. The beneficiary is conducting the day-to-day services of the company that are essential for the business to remain operational. While

the petitioner may contend that the day-to-day services and clerical duties are executed by the assistant/secretary, the petitioner's 1998 corporate income tax return indicates that it paid only $3,462 in salaries in wages, presumably to the person who held this position[1]. Such a low salary indicates that the individual was not employed on a full-time basis and, therefore, would have been unable to execute all of the company's clerical and administrative duties.

In order for the petitioner's business to operate, it must sell medical equipment. As the petitioner did not submit any evidence that it employs salesperson either as contractual employees or on the company payroll, the only conclusion that the Service can draw is that the beneficiary is executing these types of mundane duties. He is, therefore, performing the services of the petitioner's business operations rather than directing the execution of these services; the beneficiary is not working in an executive or managerial capacity as those terms are defined in the regulation.

Finally, counsel suggests on appeal that this petition must be approved because the beneficiary was previously granted nonimmigrant L-1A classification, and the beneficiary's duties have not changed. The director's decision does not indicate whether the beneficiary's nonimmigrant file was reviewed. Copies of the initial L-1A nonimmigrant visa petition and supporting documentation are not contained in the record of proceeding. Therefore, it is not clear whether the beneficiary was eligible for L-1A classification at the time of the original approval, or if the approval of the L-1A nonimmigrant classification involved an error in adjudication. However, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in this immigrant petition, the approval would constitute clear and gross error on the part of the Service. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals, which may have been erroneous. *See, e.g.*, Sussex Engg. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988).

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[1] The salaries of the three other employees were paid as "compensation to officers" according to the petitioner's 1998 corporate income tax return.